BAIL REFORM: WEIGHING EQUAL JUSTICE AND PUBLIC SAFETY VIS-À-VIS MONEY LAUNDRY CRIME

By Dr Sonia Jain[1]

ABSTRACT

The Prevention of Money Laundering Act (PMLA) features stringent bail provisions, thereby creating a notable tension between the demands of justice and the safeguarding of individual liberty. For instance, Section 45 of the PMLA, amended in 2018, makes bail exceedingly difficult to obtain, requiring the court to be satisfied that the accused is not guilty and is unlikely to commit any offense while on bail. This paper examines the impact of these regulations on accused individuals, specifically considering the balance between fundamental constitutional rights, such as Article 21 (right to life and personal liberty) and Article 14 (equality before the law), and the necessity of curbing financial offenses like money laundering, which undermines the integrity of the financial system and can fund illicit activities like terrorism. The PMLA's exacting provisions, including the reverse burden of proof, where the accused must prove their innocence rather than the prosecution proving guilt, and stringent bail criteria, have ignited debate regarding their potential impact on civil liberties and political engagement. Critics contend that these provisions risk misuse for political targeting, citing instances where opposition leaders have been arrested under the PMLA shortly before elections, whereas proponents assert their crucial role in combating serious financial crimes, which often have transnational implications and can destabilize economies, pointing to the magnitude of money laundering cases investigated by the Enforcement Directorate (ED).

Keywords: PMLA, Enforcement Directorate, Bail, corruption, financial crime.

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INTRODUCTION

"Bail involves balancing individual freedom and justice with public safety and costs, making it a critical element of an effective and socially conscious legal system."[2]

The Prevention of Money Laundering Act (PMLA) has strict bail rules that create tension between justice and personal freedom. This highlights the complex interplay between India's Prevention of Money Laundering Act (PMLA) and constitutional rights, particularly during election periods. The Delhi High Court's decision[3] to grant temporary bail reflects the judiciary's attempt to balance law enforcement with democratic processes. The PMLA's stringent provisions, including reversed burden of proof and strict bail conditions, have sparked debates about their impact on civil liberties and political participation. Critics argue these provisions can be used as tools for political persecution, while supporters maintain they are necessary to combat serious financial crimes. The Kejriwal case also draws attention to the role of the Enforcement Directorate and its increasing involvement in high-profile political cases. This situation has broader implications for India's democratic framework, raising questions about the timing of arrests during election seasons and the need to safeguard both anti-corruption efforts and political rights. The government's tough stance on economic crimes, particularly money laundering, is reflected in these strict legal measures and bail provisions.

The Prevention of Money Laundering Act (PMLA) makes getting bail very difficult because of two strict requirements. To get bail under PMLA, a person must prove they are innocent and show they won't commit any crimes while out on bail. The law, which started in 2003, focuses on stopping illegal money activities. It works in three ways: stopping money laundering from happening, taking away property bought with illegal money, and handling other money laundering issues.

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[2] Gupta, A., Hansman, C., and Frenchman, E.. "The Heavy Costs of High Bail: Evidence from Judge Randomization." *The Journal of Legal Studies*, vol. 45, no. 2, 2016, pp. 471-505 https://doi.org/10.1086/688907

[3] Pankaj Kumar Tiwari vs Enforcement Directorate, *2024 LiveLaw (Del) 1181*

MONEY LAUNDERING AS A CRIME

The complexity of money laundering operations often involves sophisticated networks of shell companies, offshore accounts, and intricate financial structures designed to obscure the true ownership of illicit funds. Criminals frequently exploit jurisdictions with weak financial regulations or limited oversight, creating multiple corporate entities across different countries to further complicate the tracking process.[4] They may also utilize cryptocurrency transactions, which can provide additional layers of anonymity and make tracing funds even more challenging. Common methods include smurfing, where large sums are broken into smaller deposits to avoid detection, and trade-based laundering, involving over or under-invoicing of goods and services. Real estate investments are particularly attractive for money launderers due to the high-value transactions and potential for price manipulation. Casinos, art markets, and luxury goods dealers are also frequently used as laundering vehicles due to their cash-intensive nature and varying levels of regulatory scrutiny. Law enforcement agencies face significant challenges in prosecuting money laundering cases due to the international nature of these operations, jurisdictional limitations, and the sophisticated methods used to conceal the paper trail. The time lag between the initial placement of funds and their eventual discovery often allows perpetrators to further distance themselves from the illegal proceeds.

Money laundering's history predates modern times, but effective anti-money laundering legislation emerged in the 20th century.[5] The United States pioneered these efforts with the Money Laundering Control Act of 1986, setting a precedent for other nations. The Vienna Convention highlighted money laundering's crucial role in drug trafficking, leading to the Financial Action Task Force's establishment in 1989.[6] The United Nations Convention against Transnational Organized Crime (2000) further emphasized the global need to combat money

[4] Blum, J. A. et al.. "Financial havens, banking secrecy and money laundering." *Trends in Organized Crime*, vol. 4, no. 4, 1999, pp. 68-71 https://doi.org/10.1007/s12117-999-1048-8

[5] Levi, M., and Soudijn, M.. "Understanding the Laundering of Organized Crime Money." *Crime and Justice*, vol. 49, 2020, pp. 579-631 https://doi.org/10.1086/708047

[6] Pol, R. F.. "Anti-money laundering: The world's least effective policy experiment? Together, we can fix it." *Policy Design and Practice*, vol. 3, no. 1, 2020, pp. 73-94 https://doi.org/10.1080/25741292.2020.1725366

laundering through Articles 6 and 7.[7] In India, early legislation like the Criminal Law Amendment Ordinance (1944) and the Smugglers and Foreign Exchange Manipulators Act (1976) indirectly addressed money laundering by targeting property seizure and illegal foreign exchange activities. However, these laws proved inadequate against increasingly sophisticated laundering methods. To address these shortcomings, India enacted the Prevention of Money Laundering Act in 2005.[8]

JAIL IS AN EXCEPTION AND BAIL IS THE RULE

State of Rajasthan v. Balchand alias Baliya[9], the landmark judgement wherein the Supreme court acknowledged the principle of 'Bail is the Rule and Jain is the exception'. This legal principle emphasizes that people accused of crimes should generally be granted bail rather than kept in jail while awaiting trial. The idea is to protect innocent people from unnecessary imprisonment, since not everyone accused is actually guilty. By keeping someone in jail before proving their guilt, we might be violating their basic human rights. The Supreme Court established this guideline to ensure fair treatment and respect for individual freedoms as guaranteed by India's Constitution, particularly Article 21, which protects personal liberty. This fundamental principle of criminal jurisprudence emphasizes personal liberty and the presumption of innocence until proven guilty. Courts must carefully balance public safety with individual rights when making detention decisions. The concept recognizes that pre-trial detention should not be used as a punitive measure, but rather as a last resort when necessary to ensure justice is served. Factors like flight risk, witness tampering, and the severity of the alleged crime are weighed against the accused's right to freedom. This approach helps prevent overcrowding in prisons, reduces the burden on the criminal justice system, and allows defendants to better prepare their defense while maintaining their jobs and family responsibilities. The principle also acknowledges that prolonged incarceration before conviction can have severe psychological, social, and economic impacts on individuals and

[7] Chang, D. H.. "Main issues and key conclusions of the Courmayeur conference: Global approach to control of money-laundering." *International Journal of Comparative and Applied Criminal Justice*, vol. 22, no. 1, 1998, pp. 1-16 https://doi.org/10.1080/01924036.1998.9678605
[8] Pande, A. K.. "Money Laundering—The Indian Perspective." *Indian Journal of Public Administration*, vol. 49, no. 4, 2003, pp. 718-722 https://doi.org/10.1177/0019556120030404
[9] AIR 1977 SUPREME COURT 2447

their families. Modern legal systems increasingly emphasize alternatives to detention, such as electronic monitoring, regular check-ins, and travel restrictions, which can effectively serve the interests of justice while preserving personal freedom.

UNDER PMLA, BAIL IS THE RULE?

The twin test under PMLA creates significant hurdles for obtaining bail, as both conditions must be simultaneously satisfied. Courts must be convinced that there is no reasonable ground to believe the accused committed the offense, and they must also be satisfied that the accused won't commit any crimes while released. This makes securing bail in money laundering cases exceptionally challenging compared to regular criminal matters. The stringent nature of these provisions has faced constitutional challenges, with critics arguing they violate the principle of presumption of innocence. The burden effectively shifts to the accused to prove their innocence at a preliminary stage, even before trial begins. This reversal of the normal presumption has significant implications for personal liberty. Courts have interpreted these provisions strictly, requiring detailed examination of evidence even at the bail stage. The requirement that the accused prove they won't commit future offenses is particularly demanding, as it involves predicting future behavior. This has led to prolonged periods of pre-trial detention in many PMLA cases. The special court handling PMLA cases must record its findings on both conditions in writing, making the bail process more time-consuming and complex. The prosecution typically presents detailed arguments about the gravity of money laundering offenses and their impact on the national economy to oppose bail applications. These strict bail provisions reflect the legislature's intent to treat economic offenses as particularly serious crimes, considering their potential to destabilize the country's financial system and economy.

JAIL IS THE EXCEPTION UNDER PMLA?

Prem Prakash v. Union of India[10], the supreme Court has laid down the Twin test bail system which creates unique challenges for both prosecutors and defendants. Courts must carefully

[10] 2024 INSC 637

weigh the gravity of money laundering allegations against personal liberty, considering factors like flight risk, evidence tampering potential, and the complexity of financial transactions involved. This balancing act often results in prolonged pre-trial detention as accused persons struggle to meet the higher evidentiary threshold. Defense lawyers frequently argue these provisions effectively reverse the presumption of innocence, forcing defendants to prove their innocence before trial. However, enforcement agencies maintain these measures are essential to prevent economic offenders from undermining investigations or dissipating proceeds of crime. The courts have developed various interpretative guidelines to apply these provisions, including examining the strength of the predicate offense, assessing the accused's cooperation level, and evaluating the status of parallel proceedings. Special consideration is given to factors like age, health conditions, and family circumstances while ensuring the broader objectives of anti-money laundering enforcement aren't compromised. Recent judicial decisions have emphasized the need for expeditious trial completion to prevent indefinite pre-trial detention. Courts increasingly require enforcement agencies to demonstrate active investigation progress and concrete grounds for continued custody, rather than relying solely on the statutory presumption against bail.

NAVIGATING THE RIGHT TO BAIL UNDER THE PMLA

This delicate balance between societal protection and individual rights forms the foundation of criminal jurisprudence.[11] Courts must weigh multiple factors when considering bail applications, including the nature and severity of the alleged crime, the strength of evidence, the likelihood of the accused fleeing justice, and potential threats to witnesses. Special legislations like PMLA incorporate stringent bail provisions due to the complex nature of economic offences, their impact on national economy, and the sophisticated methods employed by perpetrators. These provisions often require the accused to demonstrate their innocence at the bail stage itself, departing from the general principle where the prosecution bears the burden of proof. The courts have consistently held that while personal liberty is

[11] Pinto, M.. "Awakening the Leviathan through Human Rights Law – How Human Rights Bodies Trigger the Application of Criminal Law." *Utrecht Journal of International and European Law*, vol. 34, no. 2, 2018, pp. 161-184 https://doi.org/10.5334/ujiel.462

paramount, it can be curtailed in larger public interest, particularly in cases involving serious economic offences that affect the nation's financial stability. This approach recognizes that certain categories of crimes require different treatment, considering their far-reaching implications on society's economic fabric and the challenges in prosecution.

In **P. Chidambaram v. Directorate of Enforcement**[12], this balanced approach recognizes that while economic crimes can severely damage society's financial fabric and public trust, the fundamental right to liberty must still be carefully weighed. Courts should consider factors such as the accused's flight risk, ability to tamper with evidence, influence witnesses, or continue criminal activities while on bail. The judgment also acknowledges that prolonged pre-trial detention can have devastating personal and professional consequences for the accused, who remains presumed innocent until proven guilty. The court's role involves striking a delicate balance between protecting society's interests and preserving individual rights, considering the accused's roots in the community, family ties, employment status, and previous criminal record. This nuanced evaluation helps ensure that the judicial system maintains both its deterrent effect against economic crimes and its commitment to fair treatment of the accused.

This stringent bail provision, under section 45 of PMLA, effectively creates a presumption against granting bail, making it exceptionally challenging for accused persons to secure their release during trial. The court must carefully evaluate both the prosecution's objections and the defendant's circumstances before determining. The requirement to demonstrate probable innocence reverses the traditional presumption of innocence principle, placing a substantial burden on the accused to establish their non-involvement in the alleged money laundering activities. Additionally, the court needs to assess the accused's potential risk of engaging in further financial crimes or tampering with evidence if released. These conditions often result in prolonged periods of pre-trial detention, as meeting these strict criteria becomes particularly

[12] AIR 2019 SUPREME COURT 4198

difficult in complex financial investigations where documentary evidence and money trails form the backbone of the case.[13]

THE TWIN TEST UNDER PMLA

This question becomes particularly significant when considering the presumption of innocence until proven guilty, a cornerstone of criminal jurisprudence.[14] The prolonged detention without trial effectively imposes punishment before conviction, potentially violating constitutional principles. The Supreme Court has repeatedly emphasized that bail is the rule and jail is the exception, yet PMLA provisions seem to reverse this principle. Strict bail requirements appear excessive, particularly for minor financial crimes or cases based mainly on documents. Requiring proof of innocence during bail hearings contradicts fundamental legal principles by essentially conducting a premature trial. Moreover, the burden of proof placed on the accused to demonstrate their innocence for securing bail appears to conflict with Article 14's guarantee of equality before law. This becomes more problematic considering that PMLA investigations often span several years, during which the accused remains incarcerated without any determination of guilt.

Several landmark judgments have emphasized that while money laundering poses a serious threat to national security and economic stability, enforcement actions must adhere to principles of natural justice and due process. The Supreme Court has particularly scrutinized the broad powers granted to enforcement agencies, including their ability to arrest without warrant and conduct searches based on undisclosed information. Critics argue that the reverse burden of proof and stringent bail conditions create an imbalance in criminal jurisprudence, potentially violating Article 21's guarantee of personal liberty. The courts have also examined whether the extensive attachment and confiscation powers under PMLA align with constitutional property rights. This ongoing judicial discourse has led to evolving

[13] Narag, R. E.. "Exploring the consequences of prolonged pretrial incarceration: evidence from a local jurisdiction in the Philippines." *International Journal of Comparative and Applied Criminal Justice*, vol. 43, no. 2, 2018, pp. 117-134 https://doi.org/10.1080/01924036.2018.1444651
[14] Tadros, V., and Tierney, S.. "The Presumption of Innocence and the Human Rights Act." *The Modern Law Review*, vol. 67, no. 3, 2004, pp. 402-434 https://doi.org/10.1111/j.1468-2230.2004.00493.x

interpretations that seek to preserve the law's effectiveness while establishing safeguards against potential misuse and ensuring proportionality in enforcement actions.

CONSTITUTIONAL VALIDITY OF SECTION 45 OF PMLA

Section 45(1) of the PMLA was declared unconstitutional by the Supreme Court in **Nikesh Tarachand Shah v. Union of India**,[15] for violating Articles 14 and 21. The provision mandated two bail conditions: the public prosecutor must have a chance to oppose bail, and if opposed, the court needed to be convinced that the accused was likely innocent and wouldn't commit crimes while on bail. Originally, when introduced as Section 44 in the 1999 Bill, these conditions were meant to apply only to offences under the Act itself.

Unlike the Bill, the Act referenced offences listed in Part A of the Schedule rather than offences "under the Act". Part A includes various statutory offences under laws like the Indian Penal Code, Wild Life Protection Act, and Customs Act. In Nikesh Tarachand Shah[16], the Supreme Court found this distinction crucial when declaring the twin conditions unconstitutional. The recent ordinance amending Section 45(1) now applies to offences "under the Act." This means individuals charged solely with money laundering must satisfy the twin conditions for bail, even without being charged with a Part A scheduled offence: a requirement that didn't exist before the amendment.

Can the amendment reinstate the twin conditions' validity, requiring accused persons under the Act to meet these conditions despite the Supreme Court's ruling in Nikesh Tarachand Shah? The Enforcement Directorate (ED) might argue that before the amendment, the twin conditions applied only to offences listed in Part A of the Schedule, not to offences under PMLA Act Sections 3 or 4, as noted by the Supreme Court in Nikesh Tarachand Shah.

"Obviously, the twin conditions laid down in Section 45 would have no nexus whatsoever with a bail application which concerns itself with the offence of money laundering, for if section 45 is to apply, the Court does not apply its mind to whether the person prosecuted is guilty of the

[15] AIR 2017 SUPREME COURT 5500
[16] Id

offence of money laundering, but instead applies its mind to whether such person is guilty of the scheduled or predicate offence".

The court now evaluates whether an individual has committed money laundering under the PMLA Act. While the revised twin conditions may appear to connect with money laundering offences, they still pose a fundamental issue. These conditions restrict the accused's freedom by requiring them to prove their innocence and demonstrate they won't commit future offences while on bail.

The Supreme Court criticized the twin conditions because they violated a fundamental principle of criminal law: the presumption of innocence. The Court emphasized this by referencing Justice Marshall's notable dissent, joined by Justice Brennan, in **United States v. Salerno and Cafaro**[17].

"*…at the end of the day, the presumption of innocence protects the innocent; the shortcuts we take with those whom we believe to be guilty injure only those wrongfully accused and, ultimately, ourselves.*"

These words serve as a cautionary tale, reminiscent of the 2G scam case, where all defendants were acquitted despite facing intense media scrutiny and public pre-judgement. The Supreme Court's intervention in **Sanjay Chandra v. CBI**[18], granting bail and clarifying bail laws, prevented wrongful long-term imprisonment. Notably, the "twin conditions" create an inconsistency by applying only to regular bail applications, not anticipatory bail requests, as highlighted by the Supreme Court in Nikesh Tarachand Shah.

"If pre-trial arrest, bail is granted to Mr. X, which ensures throughout the trial, for an offence under Part A of the Schedule and Section 4 of the 2002 Act, such person will be out on bail without his having satisfied the twin conditions of Section 45. However, if in an identical situation, Mr. Y is prosecuted for the same offences, but happens to be arrested, and then applies for bail, the twin conditions of section 45 will have first to be met. This again leads to

[17] 481 U.S. 739 (1987)
[18] AIR 2012 SC 830

an extremely anomalous situation showing that Section 45 leads to manifestly arbitrary and unjust results and would, therefore, violate Articles 14 and 21 of the Constitution."

The amendment fails to address the core issue of inverting the presumption of innocence through its twin conditions. Similar money laundering laws in the UK and recommendations from international financial task forces do not include such conditions. Simply modifying the provision to reference "offences under the act" does not reduce the harsh nature of Section 45(1) of the PMLA act or its risk of violating an accused person's fundamental rights.

BALANCING LIBERTY AND JUSTICE?

Manish Sisodia v. Directorate of Enforcement[19]

The court has observed that keeping someone in jail for a long time before their trial, just because they're accused of a crime, would be like punishing them before proving their guilty. This is especially important in financial crime cases, where investigations can drag on for years while the accused person sits in jail. Even if someone is suspected of serious financial wrongdoing, that alone isn't enough reason to deny them bail. The court wants judges to consider real-world factors like how long the trial might take and investigation delays when deciding whether to grant bail, rather than just looking at what crime the person is accused of. This judgment sets an important precedent for similar cases, establishing that courts must take a holistic view considering factors like investigation progress, likely trial duration, and the accused's role in causing delays. It reinforces that pre-trial detention should be an exception rather than the norm, even in serious economic offences.

The Court relied upon the judgment in **Javed Gulam Nabi Shaikh v. State of Maharashtra and Another**[20], in which the principle underscores the paramount importance of procedural fairness and constitutional rights over the nature of the alleged offence. The inability of the judicial system to process cases expeditiously cannot be used to justify prolonged detention, as it effectively punishes the accused before conviction. Such delays violate constitutional

[19] 2024 INSC 595
[20] 2024 LiveLaw (SC) 437

guarantees and undermine the presumption of innocence. The burden falls on the State to either provide adequate resources for swift trials or accept that detention cannot be prolonged due to systemic inefficiencies.[21] This interpretation balances public safety concerns with individual liberty, recognizing that justice delayed is fundamentally unjust, regardless of the crime's gravity. It also serves as a catalyst for judicial reform, pushing authorities to address resource constraints and systemic delays rather than using them as grounds to deny bail.

The Supreme Court's reasoning in the **Manish Sisodia judgment**[22] highlighted several important points, such as: –

1. **Not Yet Delayed:** This prolonged detention without trial initiation raised serious concerns about the fundamental principles of justice and constitutional rights. Such extensive pre-trial confinement can have devastating effects on an accused person's life, including potential loss of employment, family hardships, and psychological trauma. The delay also compromises the quality of justice, as evidence may deteriorate and witnesses' memories fade over time. Moreover, keeping a person in custody for such an extended period contradicts the presumption of innocence, a cornerstone of criminal justice. The court's recognition of this violation acknowledges that justice delayed often amounts to justice denied, particularly when preventive detention extends beyond reasonable limits without any substantial progress in trial proceedings.

2. **Right to Bail During Court Delays**: This judicial interpretation reflects a progressive approach to balancing individual liberty with law enforcement needs. By acknowledging that prolonged detention without trial can amount to pre-trial punishment, the court emphasizes the constitutional guarantee of timely justice. The principle becomes especially relevant in PMLA cases, which often involve complex financial investigations and can stretch for years. Such delays can severely impact accused persons who may ultimately be found innocent, affecting their personal lives,

[21] Ajah, B. O. et al.. "Behind Bars But Not Sentenced: The Role of Computerized Central Repository in Addressing Awaiting-Trial Problems in Ebonyi State, Nigeria." *Sage Open*, vol. 12, no. 1, 2022 https://doi.org/10.1177/21582440221079822

[22] Supra 18

businesses, and reputations. The court's stance also recognizes that keeping undertrial prisoners in custody for extended periods strains the prison system and contradicts the presumption of innocence. This interpretation provides relief particularly to those accused who have cooperated with investigations and have not attempted to tamper with evidence or influence witnesses. It creates a reasonable middle ground where the objectives of preventing money laundering can be achieved without compromising fundamental rights and human dignity.

3. **No Contribution of Accused to Delay**: Moreover, the applications filed by the appellant were deemed legitimate and necessary for mounting an effective defence. The prosecution's characterization of these filings as the evidence did not support dilatory tactics. In examining the timeline, the court observed that most delays stemmed from administrative bottlenecks and the prosecution's own requests for adjournments. The appellant had consistently expressed readiness to proceed with the trial and had actively cooperated with court directives. The documentation requests were reasonable and within the scope of standard pre-trial procedures, focusing primarily on essential evidence and witness statements. This demonstrated the appellant's genuine intention to expedite rather than obstruct the judicial process.

4. **Magnitude of the Case:** This judicial observation underscores a fundamental tension in the criminal justice system between thorough investigation and the right to speedy trial. The digitization of documents, while making evidence more accessible, has paradoxically contributed to delays due to the overwhelming amount of material requiring scrutiny. The presence of nearly 500 witnesses further compounds the challenge, as each testimony must be carefully recorded and cross-examined. The court's position reflects growing concern about using case complexity as a default justification for prolonged detention, particularly when procedural delays stem from systemic inefficiencies rather than the accused's actions. This stance aligns with constitutional principles that emphasize personal liberty and the presumption of

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innocence until proven guilty. The situation highlights the urgent need for judicial reforms to better handle complex cases while protecting defendants' rights, possibly through specialized courts or improved case management systems.

5. **Right to Liberty:** This fundamental principle of presumption of innocence forms the bedrock of criminal justice systems worldwide. Extended pre-trial detention can inflict severe psychological trauma and irreparable damage to an individual's reputation, career, and family life. The court's stance reflects growing concerns about the backlog of cases and systemic delays that force accused persons to languish in jail while awaiting their day in court. Such prolonged detention violates constitutional guarantees and undermines public faith in the justice system. The financial burden on the state to maintain pre-trial detainees, coupled with overcrowding in prisons, further strengthens the argument for timely trials and judicious use of custodial detention. Courts must carefully balance public safety concerns with individual rights, ensuring that detention remains an exception rather than the norm in cases where the accused poses no flight risk or threat to society.

6. **Bail Conditions to Address Concerns**: Additional safeguards could include requiring the appellant to surrender their passport to prevent flight risk, restricting their movement to within specific jurisdictional boundaries, and mandating regular check-ins with local law enforcement. Electronic monitoring devices might also be employed to track the appellant's whereabouts. The court could further mandate that the accused maintain a specified distance from key witnesses and relevant locations containing evidence. Any violation of these conditions would result in immediate revocation of bail and return to custody. These measures would help balance the appellant's right to bail with the legitimate needs of the justice system to preserve the integrity of the legal proceedings.

IMPACT OF JUDGMENTS ON INDIAN LEGAL SYSTEM

These landmark rulings establish important precedents for how courts should evaluate bail applications in PMLA cases, particularly emphasizing that prolonged pre-trial detention without substantial progress in prosecution should be carefully scrutinized. The judgments recognize that while money laundering is indeed a serious economic offence, indefinite incarceration without trial runs counter to constitutional principles of personal liberty and presumption of innocence. They provide a framework for lower courts to consider factors like the stage of investigation, quality of evidence, likelihood of tampering, and length of custody when deciding bail matters. The rulings also signal that stringent provisions of PMLA cannot be mechanically applied to deny bail, and courts must undertake a holistic evaluation of circumstances in each case. This evolving jurisprudence helps strike a balance between the state's legitimate interest in prosecuting economic offences and protecting individual rights guaranteed under Article 21 of the Constitution.

Striking a Balance

The right to bail under PMLA remains a contentious issue, as it involves balancing the need for stringent measures to combat money laundering with the fundamental rights of the accused persons. The judgments in Manish Sisodia and Prem Prakash reflect the judiciary's effort to strike this balance by ensuring that the right to a speedy trial and liberty of the accused are not unduly compromised. As the country continues to grapple with complex economic offences, the interpretation of bail provisions under the PMLA will likely evolve, with the efflux of time. Courts will need to remain vigilant in ensuring that the law is applied fairly, without infringing on the fundamental rights of the accused persons. The principle that 'Bail is the rule and jail is an exception' must continue to guide the judiciary in safeguarding justice and liberty in the face of stringent laws.

Pankaj Kumar Tiwari vs Enforcement Directorate[23]

The Delhi High Court, in Pankaj Kumar Tiwari vs Enforcement Directorate, ruled that authorities cannot use PMLA's strict bail conditions to keep accused persons in jail indefinitely

[23] *2024 LiveLaw (Del) 1181*

when trials are delayed. This judgment challenges the arbitrary detention practices under Section 45 of the Prevention of Money Laundering Act, 2002. Justice Manoj Kumar Ohri granted bail to two former Bhushan Steel Limited officials, Pankaj Kumar Tiwari and Pankaj Kumar, who were imprisoned for nine months in a Rs 46,000 crore money laundering case. The judge considered that due to multiple defendants, extensive documentation, and numerous witnesses, the trial would likely face significant delays unrelated to the accused. The Court correctly determined that using Section 45 PMLA to keep accused persons in custody when delays are not their fault is impermissible. Constitutional courts must protect liberty under Article 21, and prolonged detention cannot be justified when trials face unreasonable delays.

The Court emphasized that bail is a fundamental right, while imprisonment is an exception. This principal stems from Article 21 of the Constitution, which protects personal liberty unless restricted by legal procedure. Any limitation on freedom must follow fair and reasonable processes. When considering bail applications, courts must prioritize the accused's constitutional right to a speedy trial. The Supreme Court interpreted Section 45 to include bail rights in cases where the accused has been imprisoned for approximately one year while charges are pending, as established in **Ramkripal Meena v. Directorate of Enforcement**[24]. The Court referenced several recent decisions that specifically address this matter.

The Bench cited the Manish Sisodia v Directorate of Enforcement[25] case, emphasizing that accused persons have the right to a speedy trial, even in Prevention of Money Laundering Act cases, particularly regarding bail conditions under Section 45 of PMLA. This explains that when there are long delays in court trials, especially when someone is kept in jail for extended periods, they should have the right to get bail. This applies even in cases under special laws like the Prevention of Money Laundering Act (PMLA). The Supreme Court emphasized that getting a speedy trial is a fundamental right under the constitution, which takes precedence over other laws. If delays in trial aren't the accused person's fault, courts should generally grant bail, particularly when trials are expected to take years. This interpretation adds flexibility to the strict bail provisions of the PMLA, making it more aligned with constitutional

[24] 2024 LiveLaw SC (527)
[25] Supra 19

rights. The Court emphasized that both speedy trial and personal liberty are fundamental rights that must be protected. When these rights were violated, both lower courts failed to consider this crucial factor properly. The twin conditions in Section 45 of PMLA do not reverse the fundamental principle that liberty is the norm and detention is the exception. Rather, they simply require that when these specific conditions apply to bail, they must be met.

This explains how bail decisions should be considered when court cases drag on for a long time. It suggests that if trials are delayed without good reason, courts should consider granting bail, especially in economic crime cases. These cases shouldn't be treated the same way as more serious crimes like murder, drug trafficking, or kidnapping. The text emphasizes that constitutional rights, particularly the right to a speedy trial, should influence bail decisions under both regular criminal law and money laundering laws. When delays aren't the accused person's fault, courts should lean towards granting bail unless there are strong reasons not to do so. This is especially important when trials are expected to take years to complete.

Constitutional rights under Article 21 take precedence, requiring statutory provisions to conform to these higher constitutional principles. This view was reinforced in the **Vijay Nair v. Directorate of Enforcement**[26] case on September 2, 2024, where the court noted the accused's extended detention and the unlikely prospect of a swift trial conclusion. Constitutional liberty under Article 21 remains intact even with special statutes that set higher thresholds. These laws cannot override the fundamental principle that bail is the norm and imprisonment is the exception. Keeping an under-trial detained for extended periods undermines this principle, especially when the maximum punishment for money laundering is only 7 years.

The Delhi High Court granted bail to two former Vice Presidents of Bhushan Steel Limited after considering recent Supreme Court precedents regarding prolonged detention under PMLA. The Court emphasized that Section 45 of PMLA cannot be used as a tool for indefinite incarceration, especially when trials face significant delays. The Court considered several critical factors in its ruling. The investigation, initiated in 2019, involves 156 accused persons

[26] 2024 LiveLaw (SC) 644

and 82 witnesses, with a voluminous record comprising 250,000 pages of documents for analysis. Despite this, the trial has yet to commence, and the applicants have remained in custody for over nine months. Furthermore, the main accused and other similarly placed co-accused have already been granted bail, and there is no evidence to suggest that the applicants pose a flight risk. This judgment underscores the principle that constitutional courts retain the authority to grant bail, even in cases governed by stringent provisions such as Section 45 of the Prevention of Money Laundering Act (PMLA), when fundamental rights under Article 21 of the Constitution are violated. The reasonable time for detention must be assessed against the maximum sentence (typically 7 years under PMLA). The Court granted bail under specific conditions, including the execution of a bond amounting to Rs.100,000 with a surety. The accused is prohibited from leaving Delhi/NCR without prior permission, must surrender their passport, maintain regular contact with investigators, and refrain from interfering with witnesses. This ruling underscore the judiciary's increasing concern regarding the use of preventive detention laws to prolong custody without timely trials.

ANTI-MONEY LAUNDERING PROVISIONS WORLDWIDE

Money laundering is a worldwide problem that harms societies and economies, prompting countries to implement preventive measures and regulations. –

- These regulations require financial institutions to maintain comprehensive records, report suspicious activities, and implement robust customer identification programs. Banks must file Suspicious Activity Reports (SARs) for transactions over $10,000 or any pattern of behavior that suggests potential money laundering. The Bank Secrecy Act serves as the foundation for AML compliance, mandating strict due diligence procedures and regular staff training. Financial institutions face severe penalties, including hefty fines and potential criminal charges, for non-compliance. FinCEN collaborates closely with law enforcement agencies, sharing intelligence and coordinating investigations across state and international borders. The agency also monitors emerging threats like cryptocurrency transactions and develops new guidelines to address evolving money laundering techniques. Recent updates to AML

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regulations have expanded oversight to include non-traditional financial services providers and increased focus on beneficial ownership transparency.[27]

- The regulatory body enforces strict guidelines through various legislative frameworks, including the Corruption, Drug Trafficking and Other Serious Crimes Act. Financial institutions must implement robust due diligence procedures, maintain detailed transaction records, and report suspicious activities promptly. MAS regularly updates its regulations to align with international standards set by organizations like the Financial Action Task Force (FATF). The authority also conducts regular inspections of financial institutions and imposes hefty penalties for non-compliance. Singapore's approach to AML extends beyond traditional banking to include digital payment services, cryptocurrency exchanges, and other emerging financial technologies. The country maintains close cooperation with international partners through information sharing and joint investigations to prevent cross-border money laundering activities.[28]

- The AMLC works closely with other government agencies, including the Bangko Sentral ng Pilipinas (BSP), Securities and Exchange Commission (SEC), and Insurance Commission (IC) to implement comprehensive monitoring systems. Financial institutions must report suspicious transactions and maintain detailed records of large cash transactions exceeding specified thresholds. The law requires banks, insurance companies, securities dealers, and other covered institutions to conduct thorough customer due diligence and maintain strict Know Your Customer (KYC) protocols. Violations of AMLA can result in hefty fines and imprisonment of up to 14 years. The Philippines has also strengthened its international cooperation efforts by participating in global anti-money laundering initiatives and sharing information with foreign counterparts to combat cross-border financial crimes. Recent amendments have

[27] Fatorachian, H. et al.. "Navigating the challenges of FinTech startups in the B2C market." *Cogent Business & Management*, vol. 12, no. 1, 2024 https://doi.org/10.1080/23311975.2024.2446696
[28] Hofmann, C.. "Bank Regulation in Singapore." *Journal of Financial Regulation*, 2015, pp. fjv004 https://doi.org/10.1093/jfr/fjv004

expanded AMLA's scope to include casinos and cryptocurrency transactions, addressing emerging money laundering risks in these sectors.[29]

- The legislation, enacted in 2006, requires financial institutions, gambling services, bullion dealers, and other regulated entities to comply with strict reporting and customer identification requirements. Organizations must report suspicious transactions, implement customer due diligence programs, and maintain detailed records of financial activities. AUSTRAC, Australia's financial intelligence agency, oversees compliance and enforcement of the Act, imposing substantial penalties for violations. The law also mandates risk assessments, employee training programs, and regular updates to compliance systems. Recently, the Act has been amended to include digital currency exchanges and strengthen regulations around cross-border money transfers. Financial institutions must verify customer identities, monitor ongoing transactions, and report cash transactions exceeding AUD 10,000. The legislation aligns with international standards set by the Financial Action Task Force (FATF) and plays a crucial role in preventing criminal activities and maintaining Australia's financial system integrity.[30]

- The FIU works closely with international organizations to implement global standards and best practices in combating financial crimes. They require banks, financial institutions, and designated non-financial businesses to conduct thorough customer due diligence, maintain detailed transaction records, and report suspicious activities. The UAE has also introduced hefty penalties, including fines up to AED 5 million and potential imprisonment for violations of anti-money laundering regulations. Real estate agents, precious metal dealers, and legal professionals must now register with supervisory authorities and undergo regular compliance training. The country has established specialized courts to handle money laundering cases and enhanced cooperation between law enforcement agencies. Additionally, blockchain monitoring

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[29] Vassallo, D., Vella, V., and Ellul, J.. "Application of Gradient Boosting Algorithms for Anti-money Laundering in Cryptocurrencies." *SN Computer Science*, vol. 2, no. 3, 2021 https://doi.org/10.1007/s42979-021-00558-z

[30] Pol, R. F.. "Anti-money laundering: The world's least effective policy experiment? Together, we can fix it." *Policy Design and Practice*, vol. 3, no. 1, 2020, pp. 73-94 https://doi.org/10.1080/25741292.2020.1725366

and artificial intelligence tools are being deployed to detect unusual patterns and potential illicit financial flows across the Emirates' financial system.[31]

- The National Crime Agency works alongside other law enforcement bodies like regional police forces and HMRC to track suspicious financial activities and combat money laundering. The POCA legislation gives authorities broad powers to confiscate assets believed to be derived from criminal conduct, freeze bank accounts, and prosecute individuals involved in money laundering schemes. Financial institutions must report suspicious transactions and maintain detailed records of customer due diligence. The law also requires businesses to implement robust anti-money laundering controls and appoint compliance officers. Penalties for violations can include heavy fines and imprisonment.[32] The UK's approach has become a model for other countries developing their own anti-money laundering frameworks. Regular updates to the help address emerging threats like cryptocurrency-based laundering and terrorist financing.

CONCLUSION

The Supreme Court's decision in the Vijay Nair case[33] significantly expanded the Enforcement Directorate's investigative authority while examining money laundering cases. The ruling covered additional aspects of the Prevention of Money Laundering Act, including how special courts and authorities should handle these cases and how to determine if money came from criminal activities. While the Court aimed to support laws that fight money laundering for society's benefit, it also gave the ED considerable freedom in conducting their investigations. The Supreme Court's decision to uphold strict PMLA provisions grants the Enforcement Directorate exceptional powers by bypassing standard criminal law protections, including self-incrimination safeguards and bail presumptions. This places a significant duty on the ED to exercise its authority in accordance with the law's intended purpose, as endorsed by the Court.

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[31] Sobh, T. S.. "An Intelligent and Secure Framework for Anti-Money Laundering." *Journal of Applied Security Research*, vol. 15, no. 4, 2020, pp. 517-546 https://doi.org/10.1080/19361610.2020.1812994

[32] Durguti, E. et al.. "Anti-money laundering regulations' effectiveness in ensuring banking sector stability: Evidence of Western Balkan." *Cogent Economics & Finance*, vol. 11, no. 1, 2023 https://doi.org/10.1080/23322039.2023.2167356

[33] Supra 24

Different High Courts in India have conflicting interpretations of the 2018 Amendment regarding the Twin Conditions. The Kerala High Court believes the amendment brought back the Twin Conditions, while the Bombay and Madhya Pradesh High Courts disagree, stating that the amendment did not reinstate these conditions. This split in judicial opinion shows there's no uniform understanding of how the 2018 Amendment affects the Twin Conditions across different state courts. The case involves legal questions about whether certain parts of India's anti-money laundering law are valid under the constitution. People who filed the case raised concerns about both the actual rules in the law and how changes to these rules were implemented. While the Supreme Court dealt with some issues, they decided that the question about how the changes were made needs to be looked at by a larger bench of seven judges, since it's a more complex constitutional matter. Furthermore, it is waited for a Supreme court's ruling on whether certain legal changes were properly made. If these changes are found invalid, it would affect previous court decisions about money laundering laws, including how money laundering is defined, what counts as criminal proceeds, bail conditions, and which crimes can be investigated. If these changes are rejected by the court, it could affect many ongoing cases and investigations, since current cases are following these amended rules until the court makes its final decision.

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